Supreme Court, U.S.
FILED
FEB 29 1996
CLERK

No. 95-599

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ILLINOIS CENTRAL RAILROAD,

Petitioner,

v.

STEVE DeBIASIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

MICHAEL A. POLLARD
Counsel of Record
THOMAS W. CUSHING
BAKER & McKENZIE
One Prudential Plaza
130 East Randolph Drive
Chicago, Illinois 60601
(312) 861-8000
Counsel for Petitioner

February 29, 1996

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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Petitioner files this supplemental brief[1] pursuant to Rule 25.5 of the Rules of this Court for the purpose of presenting this Court's recent decision in *Norfolk & Western Ry. Co. v. Hiles*, No. 95-6, October Term, 1995, decided February 27, 1996 ("*Hiles*") as a relevant new decision which directly affects the issue presented in petitioner's petition for a writ of certiorari. In *Hiles*, this Court held that defenses available to a defendant-railroad in a failure-to-couple Safety Appliance Act ("SAA") case include not only a closed knuckle but also a mis-

[1] Petitioner's Rule 29.1 listing is contained in its petition for a writ of certiorari.

aligned drawbar and that this Court's decision in *Affolder v. New York, Chicago and St. Louis R.R.*, 339 U.S. 96 (1950) "logically extends to every step necessary to prepare a non-defective coupler for coupling." (*Hiles*, slip op. at p. 11.) This is precisely the position presented by petitioner in its petition for a writ of certiorari.

As this Court held in *Hiles* and as this petitioner argued in its briefs, this Court's decision in *Affolder* logically dictates that circumstances other than a closed knuckle which occur during the normal operation of a railroad are good defenses to a claim under the SAA when as here, the railroad can show the presence of non-defective automatic couplers. This unanimous Court instructed in *Hiles*:

> Though *Affolder* involved a claimed closed knuckle, its language was not so limited and, as a matter of common sense, could not have been.

Hiles, slip op. at p. 11

The same logic which led this Court in *Hiles* to apply the *Affolder* decision to a misaligned drawbar supports a finding that impact speed is also an available defense to a failed couple case under the SAA. Respondent herein admitted that impact speed can result in a non-coupling even though there is no defect in the equipment. Respondent conceded that impact speed is an operational circumstance that occurs during the normal operation of a railroad. Similar to a closed knuckle and a misaligned drawbar, impact speed which results in a non-coupling of non-defective equipment should be available as a defense to a railroad in a failed couple case where the defendant can show non-defective equipment was involved.

In this case, the United States Court of Appeals for the Seventh Circuit adopted an erroneous view of this

Court's decision in *Affolder*, similar to the erroneous view adopted by respondent in *Hiles*. The Seventh Circuit concluded that only two "narrow" defenses have emerged to a failed couple claim, those of a closed knuckle and a misaligned drawbar. *DeBiasio v. Illinois Central R.R.*, slip. op. No. 94-3000 (7th Cir. 1995) (Petitioner's Appendix at 6a-9a). Petitioner raised the defense of impact speed in the district court and in its briefs to the Court of Appeals. Petitioner specifically cited evidence regarding impact speed in its briefs before the Seventh Circuit. The Seventh Circuit, however, never addressed the issue of impact speed in its decision due to its strict and limited application of *Affolder* rather than *Affolder*'s plain logic. The Seventh Circuit's harmless error ruling was expressly predicated upon its erroneous finding that the non-defective nature of a coupler is pertinent only where there is evidence of a closed knuckle or a misaligned drawbar. (Petitioner's Appendix at 13a.)

Affolder and *Hiles* make clear that certain circumstances which, in the words of *Hiles*, "are part of the normal course of railroad car operations" are not actionable violations of the Safety Appliance Act in cases such as the present one. (*See Hiles*, slip op. at p. 13.) This Court has specifically included closed knuckles (*Affolder*) and misaligned drawbars (*Hiles*) as being such normal railroad operations, and makes clear in *Hiles* that closed knuckles and misaligned drawbars are not the only two circumstances arising out of normal railroad operations which are available defenses to a failed couple SAA claim. (*See Hiles*, slip op. at p. 11 and at pp. 12-13, note 15.) Petitioner defined "operational circumstances" in its petition for a writ of certiorari as being "those situations that normally occur during railroad operations when equipment is in good working condition which prevent a

coupling from occurring." (Pet. for Cert. at p. 11.) This definition is entirely consistent with this Court's decisions in *Affolder* and *Hiles*. Petitioner respectfully submits that impact speed, like a closed knuckle and a misaligned drawbar, is a circumstance which occurs during the normal operation of a railroad. Therefore, impact speed should be an available defense to a claim under the SAA. Respondent conceded at trial that in the normal course of railroad operations impact speed can result in the non-coupling of non-defective railroad equipment. Respondent's experts limited their opinions regarding a violation of the SAA solely to the theory that the knuckle thrower "had to be broken." (R. 276, 408.) The foundational evidence regarding Exhibit 33, which was improperly barred by the district court, would have proven that the knuckle thrower was not broken in the manner claimed by respondent's experts. Indeed, respondent's own expert witness conceded that Exhibit 33 was not defective. *DeBiasio v. Illinois Central R.R.*, slip op. No. 94-3000 (7th Cir. 1995) (Petitioner's Appendix at 11a).

The Seventh Circuit agreed that the district court committed "significant" error in excluding such evidence. The Seventh Circuit failed to recognize, however, impact speed as an operational circumstance giving rise to a defense to a claim under the SAA. Therefore, the Seventh Circuit erroneously concluded that the district court's error was harmless. The Seventh Circuit's decision is inconsistent with this Court's interpretation of the SAA. Based on this Court's decisions in *Affolder* and *Hiles*, the Seventh Circuit's interpretation of available defenses under the SAA is unduly restrictive and erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Seventh Circuit should be reversed and this matter remanded to the trial court for further proceedings consistent with this Court's decision in *Hiles* or the petition for a writ of certiorari should be granted and this case should be remanded to the Seventh Circuit for further proceedings consistent with this Court's decision in *Hiles* or petitioner prays that this Court provide such other relief this Court deems just and proper.

Respectfully submitted,

MICHAEL A. POLLARD
Counsel of Record
THOMAS W. CUSHING
BAKER & McKENZIE
One Prudential Plaza
130 East Randolph Drive
Chicago, Illinois 60601
(312) 861-8000
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